

RECENT DEVELOPMENTS

THE AVAILABILITY OF HABEAS CORPUS IN OHIO TO ATTACK A CRIMINAL INDICTMENT AFTER CONVICTION

Perry v. Maxwell

175 Ohio St. 369, 195 N.E.2d 103 (1963), cert. denied, 377 U.S. 958 (1964)

After entering a plea of guilty, petitioner was sentenced to the Ohio Penitentiary on an indictment charging armed robbery.¹ By failing to file notice of appeal within thirty days after final judgment and sentencing, petitioner lost his appeal as of right under Ohio law.² Subsequently, he filed a motion in the court of appeals for a discretionary grant of leave to appeal, urging, as grounds for error, that the indictment under which he was convicted failed to allege all the essential elements of a crime under the laws of Ohio.³ The motion was denied, and the Ohio Supreme Court affirmed that denial.⁴ Petitioner, pending his appeal, had instituted the instant proceeding by filing a petition for a writ of habeas corpus⁵ in the court of appeals.⁶ The petition was based upon the same grounds urged in the motion for leave to appeal.⁷ The court of appeals, after reaching the merits of petitioner's contention, dismissed the writ.⁸ The Ohio Supreme Court, with two judges dissenting, affirmed, holding that petitioner could attack his indictment by motion at the trial or by appeal, but not collaterally by habeas corpus.⁹

¹ Pursuant to Ohio Rev. Code Ann. § 2901.13 (Page 1954).

² Ohio Rev. Code Ann. § 2953.05 (Page Supp. 1964) provides for an appeal as of right if notice of appeal is filed in the court of appeals within thirty days after judgment and sentencing. If the defendant has not exercised his right to appeal within the statutory period he may, at any time thereafter seek leave to appeal from the court, but such an appeal is discretionary and may be granted only by the court to which the appeal is taken.

³ Brief in Support of Motion for Leave to Appeal from the Court of Appeals, Hamilton County, pp. 5-10, *State v. Perry*, 175 Ohio St. 290, 194 N.E.2d 56 (1963).

⁴ *State v. Perry*, 175 Ohio St. 290, 194 N.E.2d 56 (1963).

⁵ Chapter 2725 of the Ohio Revised Code contains the general provisions for habeas corpus. The procedural steps and the form of the petition are provided for in §§ 2725.04-.15. Section 2725.03 provides that the supreme court, the court of appeals, the courts of common pleas and the probate courts shall have jurisdiction to issue the writ. Under the latter section any judge of the above mentioned courts may issue the writ. The supreme court and the court of appeals are also granted authority to issue the writ by the Ohio Constitution Article IV, sections 2 and 6 respectively.

⁶ Pursuant to Ohio Rev. Code Ann. § 2725.03 (Page 1954).

⁷ Brief for Appellant, pp. 3-7, *Perry v. Maxwell*, 175 Ohio St. 369, 195 N.E.2d 103 (1963).

⁸ *Perry v. Maxwell*, No. 7121, Franklin Co. Ct. App., Dec. 11, 1962.

⁹ *Perry v. Maxwell*, 175 Ohio St. 369, 195 N.E.2d 103 (1963). The United States Supreme Court subsequently denied certiorari, 377 U.S. 958 (1964).

The language of the Ohio Supreme Court in the instant case is indicative of recent cases in which the court has narrowly construed the availability of habeas corpus in Ohio as a postconviction remedy. By invoking the doctrines of comity and waiver, the court has narrowed the scope of this traditional writ until it has become—with several important exceptions—solely a preconviction remedy. The grounds given for this virtual emasculation of the writ have been that appeal is an adequate remedy; that habeas corpus should not be a substitute for appeal; and that only errors which go to the jurisdiction of the court are cognizable in habeas corpus. It is in the first and the last of these areas that the court has sought by judicial construction to avoid the flood of habeas corpus petitions which have followed recent United States Supreme Court rulings.¹⁰

From the time it was incorporated into the common law of Ohio, the writ of habeas corpus has been considered a proper remedy for illegal restraints or convictions rendered by courts without proper jurisdiction.¹¹ The case law adhering to this view has been codified by section 2725.05 of the Ohio Revised Code.¹² In setting forth the instances in which habeas corpus should not be allowed the statute provides:

If it appears that a person alleged to be restrained of his liberty is in the custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, *and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order*, the writ of habeas corpus shall not be allowed. If the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order.¹³

The per curiam majority opinion in the instant case and the opinions of the two dissenting judges point out the two distinct issues involved. Judge Herbert's brief dissent¹⁴ implicitly attacks the majority's holding that the omission of an essential element does not deprive the trial court of jurisdiction even if the court has rendered judgment on that indictment.

¹⁰ The following statistics relating to habeas corpus proceedings originating in the Ohio Supreme Court were set forth in 38 Ohio Bar 113 (1965):

Cases or Petitions Filed:

1957— 2

1962—29

1963—33

1964—83

Petitions Heard & Disposed of:

1962—21

1963—35

1964—71

In the beginning of 1965 there were reported to be 160 merit cases on the Ohio Supreme Court's docket of which 27 were habeas corpus cases.

¹¹ *State v. Cimpritz*, 158 Ohio St. 490, 110 N.E.2d 416 (1953); *Ex parte Bushnell*, 9 Ohio St. 77 (1859); *Ex parte Shaw*, 7 Ohio St. 81 (1858); *Cantaway v. Maxwell*, 120 Ohio App. 439, 203 N.E.2d 258 (1964).

¹² Ohio Rev. Code Ann. § 2725.05 (Page 1954).

¹³ Ohio Rev. Code Ann. § 2725.05 (Page 1954). (Emphasis added.)

¹⁴ *Perry v. Maxwell*, 175 Ohio St. 369, 371, 195 N.E.2d 103, 105 (1963) (dissenting opinion).

Although Judge Herbert states no more than that he dissents on the authority of *State v. Cimpritz*,¹⁵ his dissent raises questions which go to the very heart of the majority decision. An examination of *Cimpritz* and subsequent cases shows that the court has made an awkward transition in reaching its position in the instant case. In the *Cimpritz* case, the defendant appealed a conviction under an indictment which charged attempted burglary but which omitted the words "maliciously and forcibly." The Ohio Supreme Court held that such an indictment was fatally defective and that the trial court had never obtained jurisdiction of the subject matter. Judge Zimmerman speaking for the majority stated that:

[A] judgment of conviction based on an indictment which does not charge an offense is void for lack of jurisdiction of the subject matter and may be successfully attacked either on direct appeal to a reviewing court or by a collateral proceeding.¹⁶

Although this statement was incorporated into the court's syllabus, it is conceded to be, at best, strong dictum in light of the fact that Cimpritz was appealing his conviction rather than proceeding in habeas corpus. The result reached in *Cimpritz* is based upon the assertion that there is no common law of crimes in Ohio. The enactment of a comprehensive criminal code at the inception of Ohio's statehood has consistently been held to have abrogated common law crimes.¹⁷ Under this theory of common law ouster the only criminal acts in Ohio are those which the legislature has expressly designated as criminal. It can be argued that if the state in its indictment has failed to allege every essential element of any one crime, then the defendant has not been charged with any crime. Therefore, if there has been an essential allegation or element omitted, it should follow that the omission is fatal to the court's jurisdiction.¹⁸

In the light of two subsequent decisions by the court, it appears that Judge Zimmerman's earlier position is to be distinguished from the case where the defendant failed to attack the indictment at the trial level. *In re Bryant*¹⁹ involved a defendant convicted of forging a driver's license. Bryant contended that the statute under which he was indicted and convicted did not apply to driver's licenses. The court here apparently applied a different interpretation of jurisdiction of the subject matter, for it held without explanation that the trial court had jurisdiction of the person and of the sub-

¹⁵ 158 Ohio St. 490, 110 N.E.2d 416 (1953).

¹⁶ *Id.* at 494, 110 N.E.2d at 418.

¹⁷ *State v. Cimpritz*, *supra* note 11; *Smith v. State*, 12 Ohio St. 466 (1861); *Vanvalkenburg v. State*, 11 Ohio 404 (1842).

¹⁸ See *Simpson v. Maxwell*, 1 Ohio St. 2d. 71, 72, ____ N.E.2d ____, ____ (1964) (dictum); *Jetter v. Maxwell*, 176 Ohio St. 219, 229, 198 N.E.2d 668, 669, (1964) (dictum); *Anderson v. Maxwell*, 175 Ohio St. 210, 211, 192 N.E.2d 779, 780, (1963) (dictum); *Stewart v. State*, 41 Ohio App. 351, 181 N.E. 111 (1932); *Annot.*, 57 A.L.R. 85, 87 (1928); 4 Wharton, *Criminal Law and Procedure* § 1769 (12th ed. 1957); 5 Wharton, *supra* § 2233; *Joyce*, *Indictments* § 49 (2d ed. 1924).

¹⁹ 171 Ohio St. 16, 167 N.E.2d 500 (1960).

ject matter and, therefore, that petitioner's only remedy was to seek a review on appeal. In *State v. Wozniak*,²⁰ the court attempted to reconcile *Bryant* and *Cimpritz* by noting that an indictment which does not charge an offense is void but that after conviction a judgment is binding as between the state and the court "where the court rendering it had jurisdiction of the person of the defendant and also jurisdiction of the subject matter, i.e., jurisdiction to try the defendant for the crime for which he was convicted."²¹ From these statements it becomes apparent that the court in *Bryant* and *Wozniak* has altered its previous interpretation of jurisdiction of the subject matter. Judge Zimmerman in *Cimpritz* found the judgment void for lack of jurisdiction of the subject matter because the indictment was fatally defective. In *Bryant* and *Wozniak* the court apparently based jurisdiction of the subject matter upon the offense generally rather than upon the form in which the offense is charged.²²

An analysis of *State v. Wozniak*²³ shows that it was in this case that the critical transition was made by the court. After quoting syllabus six from the *Cimpritz* case,²⁴ the court noted that amendment by the trial court of an indictment to supply a missing charge of an essential element of the crime would be unconstitutional under Section 10 of Article I of the Ohio Constitution.²⁵ Despite these considerations, the court in dictum went on to state that the judgment of the lower court could not be set aside collaterally after a judgment of conviction had been rendered.²⁶ On the basis of the allegedly analogous civil authority of *Mantho v. Board of Liquor Control*,²⁷ the court asserted that such a judgment of conviction was binding as between the state and the defendant even though the defendant might stand convicted under a void indictment.²⁸ By relying upon *Mantho* the court apparently invoked a theory that the objection to lack of jurisdiction

²⁰ 172 Ohio St. 517, 178 N.E.2d 800 (1961).

²¹ *Id.* at 522, 178 N.E.2d at 804. (Emphasis added.) It should be noted that the court in quoting the syllabus from *Cimpritz* for the second time significantly omitted the words "for lack of jurisdiction of the subject matter" thus ignoring or avoiding the very obstacle to its ultimate conclusion.

²² *Accord*, *Doughty v. Sacks*, 173 Ohio St. 407, 183 N.E.2d 368 (1962), *rev'd on other grounds sub nom.* *Doughty v. Maxwell*, 376 U.S. 202 (1964).

²³ *Supra* note 20.

²⁴ *State v. Cimpritz*, *supra* note 11 at 490, 110 N.E.2d at 416. The sixth syllabus of the court reads as follows:

A judgment of conviction based on an indictment which does not charge an offense is void for lack of jurisdiction of the subject matter and may be attacked successfully either on direct appeal to a reviewing court or by a collateral proceeding.

²⁵ Ohio Const. art. I, § 10 provides that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury. . . ."

²⁶ This curiously retrospective overruling of the dictum in *Cimpritz* by further dictum suggests that the court might already have been anticipating an increase in the applications for the writ.

²⁷ 162 Ohio St. 37, 120 N.E.2d 730 (1954).

²⁸ *State v. Wozniak*, *supra* note 20, at 522-23, 178 N.E.2d at 804.

had been waived. *Mantho* involved an appeal from a decision of the court of common pleas reversing the State Liquor Board's refusal to renew the liquor licenses of appellees. In the Ohio Supreme Court, the licensees argued that under the Ohio Administrative Procedure Act,²⁹ the Liquor Board had no standing to appeal from an adverse ruling in the common pleas court and that, therefore, the court of appeals had no jurisdiction. The supreme court held that the court of appeals had general appellate jurisdiction and that the appellees waived their objection by failing to raise it before the court of appeals had rendered a decision on the merits. It is difficult to see the analogy between the situation in *Mantho* and the situation in *Wozniak*. Not only did *Mantho* involve the somewhat peculiar characteristics of appellate jurisdiction, but it also involved a statutory limitation upon an existing authorization of general jurisdiction. It is submitted that neither of these problems was involved in either *Wozniak* or in any of the subsequent habeas corpus cases which have accepted the dictum of *Wozniak*.

It was not long before the court was faced with the anomalous result of the rationale of the *Wozniak* case. In *Bolin v. Maxwell*,³⁰ the petitioner had been indicted as the codefendant of *Wozniak*. Bolin, not prosecuting an appeal as had *Wozniak*, sought a writ of habeas corpus after *Wozniak's* conviction was modified by a finding that one count of the two count indictment was fatally defective.³¹ At the time that Bolin applied for the writ, the court had already held that a count similar in every respect to the count returned by the grand jury against Bolin and under which Bolin had been convicted was fatally defective.³² The state, as respondent, could not effectively argue that the indictment was valid because of the prior decision in *Wozniak*. But the state could effectively argue by virtue of the same case that Bolin was precluded from attacking his indictment by habeas corpus. With Judges Bell and Matthias dissenting, the court in a per curiam decision, again without explanation, held that habeas corpus was not the proper way to attack an indictment.³³ The decision was rendered over the protestations of Judge Bell that "this is a classic example for the allowance of habeas corpus."³⁴

The instant case contains another dissent, treating the problems presented by the holding in the *Perry* case. The majority opinion expressly relied upon the conclusion that petitioner had an adequate remedy either in the trial court or the court of appeals. Judge Gibson directs his dissent

²⁹ 120 Laws of Ohio, 358, 366 (1963) [Now Ohio Rev. Code Ann. § 119.12 (Page 1953)].

³⁰ 173 Ohio St. 517, 184 N.E.2d 91 (1961).

³¹ *State v. Wozniak*, *supra* note 20. *Wozniak* had been indicted on one count of possession of burglary tools and one count relating to attempted burglary. Upon appeal the court held that the count on possession was void but remanded *Wozniak* on the second count.

³² *State v. Wozniak*, *supra* note 20.

³³ *Bolin v. Maxwell*, 173 Ohio St. 517, 184 N.E.2d 91 (1961).

³⁴ *Id.* at 518, 184 N.E.2d at 92 (dissenting opinion).

to the argument that, since the court of appeals did not render an opinion on the merits of petitioner's motion for leave to appeal, the Ohio Supreme Court cannot determine whether the court of appeals abused its discretion.³⁵ The criminal appellate procedure in Ohio provides for an appeal as of right if notice of appeal is filed within thirty days after final judgment. Any time thereafter, the defendant may move for leave to appeal.³⁶ Such an appeal, however, is discretionary with the court and rests upon a showing that the defendant acted reasonably in waiting for more than the thirty-day period.³⁷ Gibson's objection seems valid for in at least one case the Ohio Supreme Court has refused habeas corpus on the ground that petitioner should have proceeded by appealing the lower court's refusal to grant leave to appeal.³⁸

The dissent, in the instant case, asserts that the court is telling petitioner, in effect, that the correct remedy is the very remedy which he has already been refused. "Thus, petitioner now is in the position that he can never have a review on the merits of his contention."³⁹ As Judge Gibson notes, the court of appeals has discretion in ruling on a motion for leave to appeal.⁴⁰ But such discretion is not unbridled. The court should note the reasons for failure to file a timely appeal as well as probable error in the proceedings of the trial court.⁴¹ Arguably, the Ohio Supreme Court's rulings that certain fundamental issues are not cognizable on habeas corpus imply that a standard more favorable to the defendant will be applied to motions for leave to appeal. Gibson suggests that these discretionary motions should or must be granted unless the defendants "are clearly not so entitled. . . ." ⁴² This would be a helpful but certainly not a definitive answer to the problem. It is doubtful whether any standard can or even should be developed for the exercise of a discretionary power. Each case must be decided upon its particular facts. However, discretion, like any other power, can be abused.⁴³ Without written findings of the court of appeals, such abuses becomes incorrigible because the supreme court cannot review

³⁵ *Perry v. Maxwell*, *supra* note 7, at 371, 195 N.E.2d at 105 (dissenting opinion).

³⁶ Ohio Rev. Code Ann. § 2953.05 (Page Supp. 1964).

³⁷ See Skeel, "Some Aspects of Appellate Procedure in Ohio," 12 W. Res. L. Rev. 645 (1961), for a discussion of general Ohio appellate procedure.

³⁸ *Schaber v. Maxwell*, 176 Ohio St. 58, 197 N.E.2d 361 (1964).

³⁹ *Perry v. Maxwell*, *supra* note 7, at 372, 195 N.E.2d at 105 (dissenting opinion).

⁴⁰ See Ohio Rev. Code Ann. § 2953.05 (Page Supp. 1964).

⁴¹ *McCoy v. Maxwell*, 176 Ohio St. 249, 199 N.E.2d 2 (1964).

⁴² *Jerry v. Maxwell*, *supra* note 7, at 372, 195 N.E.2d at 105 (dissenting opinion).

⁴³ In the recent case of *Walker v. Maxwell*, 1 Ohio St. 2d 136, —N.E.2d—(1965), the court stated at 138,—N.E.2d at—:

Where an accused has failed to pursue his appeal within the statutory period for appeals as a matter of right he has available to him the motion for leave to appeal. This is not an empty right. If the accused can show reasonable grounds for his delay in pursuing his appeal as matter of right within the statutory period or if the failure to grant such appeal would result in a clear miscarriage of justice, to deny such a motion would constitute an abuse of discretion.

the ruling to determine whether there was an abuse of discretion. It cannot be presumed, according to Judge Gibson, that the court of appeals did not abuse its discretion and, therefore, that petitioner had an adequate remedy by way of appeal.⁴⁴ Any remedy which does not allow the petitioner to have at least one appellate hearing on the merits of his claim cannot be considered adequate. Judicial finality should not be invoked in such a way as to prevent the petitioner from obtaining a hearing on the merits of his claimed illegal restraint.

Ohio prisoners have fared no better in federal courts than in state courts, despite the recent habeas corpus cases which have liberally construed and expanded federal jurisdiction to accept petitions from state prisoners. Perhaps the case which is most frequently misinterpreted by the prisoner-petitioner is the recent decision in *Fay v. Noia*.⁴⁵ The *Fay* case interpreted the federal habeas corpus statute⁴⁶ as requiring the exhaustion of only those remedies available at the time that the federal writ is sought. However, the Court specifically stated that the holding would not overrule the previous case of *Brown v. Allen*⁴⁷ as far as deliberate or negligent lapsing of time to perfect an appeal. In such an instance, federal habeas corpus would still be barred to defendants who failed to perfect their appeals within the time limits prescribed by state law.⁴⁸ It should be noted that the federal district court may make a separate finding as to the prisoner's efforts to perfect an appeal. It is not bound by any determination of the state court in this regard.⁴⁹ This gives a great deal of discretion to the district judge, which he may exercise in granting or denying the writ.

A recent federal court of appeals decision applying *Fay v. Noia* to an Ohio prisoner still required the state prisoner to exhaust his state remedies of habeas corpus and delayed appeal before seeking the federal writ.⁵⁰ Since *Brown* had previously held that a state habeas corpus proceeding was not a prerequisite to federal jurisdiction, the Sixth Circuit is probably pronouncing its own policy. It would not seem, however, in light of the Ohio Supreme Court's pronouncements with respect to availability of

⁴⁴ *Perry v. Maxwell*, *supra* note 7, at 372, 195 N.E.2d at 105 (dissenting opinion).

⁴⁵ 372 U.S. 391 (1963).

⁴⁶ 28 U.S.C. § 2254 (1958), which provides:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

⁴⁷ 344 U.S. 443 (1953).

⁴⁸ *Id.* at 485-86.

⁴⁹ *Townsend v. Sain*, 372 U.S. 293, 313 (1963).

⁵⁰ *Saulsbury v. Green*, 318, F.2d 320 (6th Cir. 1963).

habeas corpus to attack an indictment, that the federal court would require exhaustion of state remedies. One federal district judge has allowed the federal writ on the assumption that the Ohio courts would probably refuse the state writ.⁵¹

The net result of the Ohio cases, including the instant case, is that the jurisdictional grounds for maintaining a collateral attack on an indictment after rendering of judgment have been almost entirely emasculated. The inescapable conclusion is that there are no conceivable groups upon which such a contention can be effectively raised by a collateral proceeding. The fact that the indictment is fatally defective or void is immaterial if the petitioner has not sought to remedy his alleged injustice by appeal. If he has been able to maintain the same issue on appeal and that issue has been decided against him, then he is also precluded from raising it on habeas corpus.⁵² The instant case successfully closes out the last remaining possibility: where the defendant has sought but been denied appeal without consideration of the merits of his claim.

As a matter of policy it may be practical to limit the availability of habeas corpus in such a way that it is not used as a substitute for appeal or a means of circumventing normal and orderly procedures. However, it is submitted that in many instances it may be more practical for the judiciary to consider the merits of the defendant's claim than to direct him to recourse through the appellate procedure.⁵³ In Ohio every petition for habeas corpus filed with the supreme court is investigated by master commissioners appointed by the court.⁵⁴ In every case there is a hearing with the state putting forth its evidence as to the validity of the prisoner's detention. With these findings before them, the court could give the prisoner his one "pass over the course" and thus obviate the need for review of a motion for leave to appeal. In the *Bolin* case,⁵⁵ Judge Bell succinctly noted that since the court seemed to agree that the indictment was absolutely void, "the ends of justice would be accomplished more effectively by allowing such relief in this action, thus preventing the circuity of action which the majority opinion necessitates."⁵⁶

⁵¹ Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964).

⁵² Naples v. Maxwell, 176 Ohio St. 443, 200 N.E.2d 340 (1964); Graff v. Green, 172 Ohio St. 294, 175 N.E.2d 304 (1961); *Ex parte* Stringer, 171 Ohio St. 400, 171 N.E.2d 337 (1960).

⁵³ Professor Paul Freund suggests that habeas corpus proceedings enjoy at least two advantages: (1) some defects which do not appear on the record for appeal can be considered on habeas corpus; (2) the state of the trial court's records may require fresh findings of fact. "Habeas Corpus—Proposals For Reform," 9 Utah L. Rev. 18, 27 (1964).

⁵⁴ Such has become the practice under rule VIII, section 14 of the Rules of Practice of the Ohio Supreme Court. See McCann v. Maxwell, 174 Ohio St. 282, 189 N.E.2d 143 (1963), which upheld the propriety of referring petitions to master commissioners for hearings.

⁵⁵ Bolin v. Maxwell, *supra* note 30.

⁵⁶ *Id.* at 518, 184 N.E.2d at 92 (dissenting opinion).

It must be noted that the doctrine pronounced in *Wazniak* and followed in the instant case is not a doctrine of exhaustion of remedies. The supreme court has concluded that whenever appeal is an adequate remedy, *i.e.*, whenever the defendant could have maintained his argument on appeal, habeas corpus will not serve as a substitute. Whether or not this doctrine is an attempt to avoid the effects of recent United States Supreme Court cases liberally construing the writ of habeas corpus is not known and obviously cannot be determined from the pronouncements of the Ohio court in its per curiam opinions. Habeas corpus petitioners should not be allowed purposeful attempts to by-pass the orderly judicial processes of the state, but when an appeal is not available the prisoner should not be forever precluded from raising the merits of his claim. Appeal is an adequate remedy only when such remedy is available, and under circumstances such as those present in this case appeal is not an adequate remedy.⁵⁷

Ohio habeas corpus is at this time in a state of flux.⁵⁸ Recent right-to-

⁵⁷ Ohio procedure provides several statutory methods of attacking the conviction and judgment both before and immediately following such judgment. See Ohio Rev. Code Ann. §§ 2941.54, 2941.57, 2945.79, 2947.02 (Page 1954). But the postjudgment attacks must be made within three days. Probably the most compelling reason for leaving habeas corpus open as an avenue for correction of illegal restraints is that Ohio judges have no statutory authority for appointing counsel to argue appeals for indigent defendants. In addition the appellate courts have held that the fact that a defendant did not realize that his sentence was illegal is not sufficient grounds for allowing the discretionary appeal. *Ex parte Hertz*, 139 N.E.2d 645 (Ohio Ct. App. 1953).

⁵⁸ The following case citations are not meant to exhaust the Ohio Supreme Court's pronouncements on the subject of postconviction remedies but rather to indicate that authority is not solely for or against the availability of such remedy. No attempt is made to determine what factors allow the Ohio prisoners to attack successfully a conviction by habeas corpus since most of the cases hold that such an attack is not available.

I. Cases in which the courts have refused to consider the merits of petitioner's claims.

(A) *indictment not supported by evidence*: *Dean v. Green*, 177 Ohio St. 22, 201 N.E.2d 598 (1964); *Cook v. Maxwell*, 177 Ohio St. 18, 201 N.E.2d 597 (1964); *Villasino v. Maxwell*, 174 Ohio St. 483, 190 N.E.2d 265 (1963). (B) *defenses and questions of evidence*: *McElroy v. Maxwell*, 177 Ohio St. 16, 201 N.E.2d 527 (1964); *Brown v. Maxwell*, 174 Ohio St. 29, 186 N.E.2d 612 (1962); *In re Poage*, 87 Ohio St. 72, 100 N.E. 125 (1912). (C) *competency of counsel*: *Poe v. Maxwell*, 177 Ohio St. 28, 201 N.E.2d 703 (1964); *Swogger v. Maxwell*, 176 Ohio St. 415, 200 N.E.2d 313 (1964); *Vaughn v. Maxwell*, 176 Ohio St. 289, 199 N.E.2d 570 (1964); *Henderson v. Maxwell*, 176 Ohio St. 187, 198 N.E.2d 456 (1964); *Schaber v. Maxwell*, 176 Ohio St. 58, 197 N.E.2d 361 (1964); *Gallagher v. Maxwell*, 175 Ohio St. 440, 195 N.E.2d 810 (1964); *Lancaster v. Green*, 175 Ohio St. 203, 192 N.E.2d 776 (1963); *Jackson v. Maxwell*, 174 Ohio St. 32, 186 N.E.2d 725 (1962); *Rodriguez v. Sacks*, 173 Ohio St. 456, 184 N.E.2d 93 (1962); *McConaughy v. Alvis*, 165 Ohio St. 102, 133 N.E.2d 133 (1956). (D) *procedural irregularities in arrest*: *Simpson v. Maxwell*, 1 Ohio St. 2d 71, 203 N.E.2d 314 (1964); *Shelton v. Haskins*, 176 Ohio St. 297, 199 N.E.2d 597 (1964); *Jetter v. Maxwell*, 176 Ohio St. 219, 198 N.E.2d 668 (1964); *Anderson v. Maxwell*, 175 Ohio St. 210, 192 N.E.2d 779 (1963); *Wells v. Maxwell*, 174 Ohio St. 198, 188 N.E.2d 160 (1963); *Brown v. Maxwell*, 174 Ohio St. 29, 186 N.E.2d 612

counsel cases are but one reflection of the unsettled and cloudy position of the Ohio court in relation to habeas corpus generally.⁵⁹ It seems to be

(1962). (E) *refusal to supply indigent defendant with transcript of testimony for appeal*: Cook v. Maxwell, 177 Ohio St. 18, 201 N.E.2d 597 (1964); Shelton v. Haskins, 176 Ohio St. 296, 199 N.E.2d 598 (1964); Vaughn v. Maxwell, 176 Ohio St. 289, 199 N.E.2d 570 (1964); McCoy v. Maxwell, 176 Ohio St. 249, 199 N.E.2d 2 (1964); Tinsley v. Maxwell, 176 Ohio St. 185, 198 N.E.2d 673 (1964). (F) *irregularities in selecting grand jurors*: Cantrell v. Maxwell, 177 Ohio St. 15, 201 N.E.2d 593 (1964); Charles v. Maxwell, 176 Ohio St. 217, 193 N.E.2d 773 (1964); State *ex rel.* Burton v. Smith, 174 Ohio St. 429, 189 N.E.2d 876 (1963); Huling v. State, 17 Ohio St. 533 (1867). (G) *innocence of petitioner and admissibility of evidence*: Dean v. Green, 177 Ohio St. 22, 201 N.E.2d 598 (1964); Cook v. Maxwell, 177 Ohio St. 18, 201 N.E.2d 597 (1964); Page v. Green, 174 Ohio St. 178, 187 N.E.2d 592 (1963); Rodriguez v. Sacks, 173 Ohio St. 456, 184 N.E.2d 93 (1962); Spence v. Sacks, 173 Ohio St. 419, 183 N.E.2d 363 (1962); *In re Poage*, 87 Ohio St. 72, 100 N.E. 125 (1912). (H) *double jeopardy*: Poe v. Maxwell, 177 Ohio St. 28, 201 N.E.2d 703 (1964); Lowther v. Maxwell, 175 Ohio St. 39, 191 N.E.2d 172 (1963); Page v. Green, 174 Ohio St. 178, 187 N.E.2d 592 (1963); Maloney v. Maxwell, 174 Ohio St. 84, 186 N.E.2d 728 (1962); Jackson v. Maxwell, 174 Ohio St. 32, 186 N.E.2d 725 (1962); Foran v. Maxwell, 173 Ohio St. 561, 184 N.E.2d 398 (1962); Vertz v. Maxwell, 173 Ohio St. 459, 183 N.E.2d 924 (1962); Weaver v. Sacks, 173 Ohio St. 415, 183 N.E.2d 373 (1962); Barker v. Sacks, 173 Ohio St. 413, 183 N.E.2d 385 (1962); *In re Poage*, 87 Ohio St. 72, 100 N.E. 125 (1912). (I) *right to allocution*: Lancaster v. Green, 175 Ohio St. 203, 192 N.E.2d 776 (1963). (J) *perjured testimony*: O'Bannon v. Haskins, 1 Ohio St. 2d 110, 205 N.E.2d 16 (1965); White v. Maxwell, 174 Ohio St. 186, 187 N.E.2d 878 (1963).

II. Cases in which the court did not question the petitioner's ability to raise the issue by habeas corpus.

(A) *compulsory process to obtain witnesses*: Lancaster v. Green, 175 Ohio St. 203, 192 N.E.2d 776 (1963); Rodriguez v. Sacks, 173 Ohio St. 456, 184 N.E.2d 93 (1962). (B) *right to a speedy trial*: Partsch v. Haskins, 175 Ohio St. 139, 191 N.E.2d 804 (1963). (D) *delay in sentencing*: Neal v. Maxwell, 175 Ohio St. 201, 192 N.E.2d 782 (1963). (E) *running of sentence while on parole*: Bush v. Maxwell, 175 Ohio St. 207, 192 N.E.2d 774 (1963). (F) *validity of arrest*: Anderson v. Maxwell, 175 Ohio St. 210, 192 N.E.2d 779 (1963). (G) *legality of arrest, search and seizure without warrant, and admissibility of evidence*: Poe v. Maxwell, 177 Ohio St. 28, 201 N.E.2d 703 (1964); Dixon v. Maxwell, 177 Ohio St. 20, 201 N.E.2d 592 (1964). (H) *extradition*: Murphy v. Maxwell, 176 Ohio St. 297, 199 N.E.2d 597 (1964). (I) *cruel and unusual punishment*: McDougale v. Maxwell, 1 Ohio St. 2d 68, 203 N.E.2d 314 (1964). (J) *right to counsel*: Murphy v. Maxwell, 177 Ohio St. 174, 203 N.E.2d 233 (1964); Bussey v. Maxwell, 177 Ohio St. 111, 202 N.E.2d 698 (1964); Freeman v. Maxwell, 177 Ohio St. 93, 202 N.E.2d 623 (1964); Madison v. Maxwell, 177 Ohio St. 84, 202 N.E.2d 617 (1964); Johnson v. Maxwell, 177 Ohio St. 72, 202 N.E.2d 417 (1964); Colan v. Haskins, 177 Ohio St. 65, 202 N.E.2d 419 (1964); McQueen v. Maxwell, 177 Ohio St. 30, 201 N.E.2d 701 (1964); Troxell v. Maxwell, 177 Ohio St. 8, 201 N.E.2d 522 (1964); Thomas v. Maxwell, 175 Ohio St. 233, 193 N.E.2d 150 (1963); Meadows v. Maxwell, 175 Ohio St. 213, 192 N.E.2d 781 (1963). (K) *legally incompetent counsel*: Weston v. Haskins, 177 Ohio St. 110, 202 N.E.2d 697 (1964); Ulrich v. Maxwell, 177 Ohio St. 108, 202 N.E.2d 702 (1964).

⁵⁹ Compare Schaber v. Maxwell, *supra* note 38; Gallagher v. Maxwell, 175 Ohio St. 440, 195 N.E.2d 810 (1964); Rodriguez v. Sacks, 173 Ohio St. 456, 184

settled at this date that right-to-counsel is an issue which is cognizable in a habeas corpus proceeding.⁶⁰ In these cases the supreme court simply ignores its usual concern with jurisdiction of the trial court or the adequacy of review by appeal. In addition, two recent cases have seemingly allowed a petitioner to attack his indictment collaterally albeit not successfully.⁶¹ The overall thrust of the Ohio Supreme Court's pronouncements in the field of habeas corpus is to reduce the writ to solely a preconviction remedy for illegal detention.⁶² The difficulty results from the fact that the Ohio Supreme Court makes the transition from one position to another leaving behind only the scattered remains of inconsistent case holdings. There are no express overrulings of previous inconsistent cases, nor are there any lucid opinions setting forth the court's position. The writ of habeas corpus is too deeply rooted in our system of law to allow it to be treated on a case-to-case basis or limited and extended by judicial fiat. It is unfortunate that the Ohio Supreme Court has chosen to limit the writ, for in so doing, it has altered part of the dual court concept so ingrained in our system of federalism. If the court does not live up to its obligation, the Ohio prisoner will be forced to turn to the federal courts in an attempt to obtain the remedy denied by the courts of his own state.⁶³

N.E.2d 93 (1962); *Doughty v. Sacks*, 173 Ohio St. 407, 183 N.E.2d 368 (1962), *rev'd, vacated and remanded per curiam sub nom. Doughty v. Maxwell*, 372 U.S. 781 (1962), *reaff'd sub nom. Doughty v. Sacks*, 175 Ohio St. 46, 191 N.E.2d 727 (1963), *rev'd per curiam sub nom. Doughty v. Maxwell*, 376 U.S. 202 (1964), *with Johnson v. Maxwell*, 177 Ohio St. 72, 202 N.E.2d 417 (1964). For a discussion of right-to-counsel and the *Doughty* case, see 25 Ohio St. L.J. 435 (1964).

⁶⁰ *Yarbrough v. Maxwell*, 1 Ohio St. 2d 91, — N.E.2d — (1965); *Dodds v. Haskins*, 1 Ohio St. 2d 82, — N.E.2d — (1965); *Freeman v. Maxwell*, 177 Ohio St. 84, 202 N.E.2d 617 (1964); *Johnson v. Maxwell*, *supra* note 59; *Colan v. Haskins*, 177 Ohio 65, 202 N.E.2d 623 (1964); *Troxell v. Maxwell*, 177 Ohio St. 8, 201 N.E.2d 705 (1964).

⁶¹ *Braxton v. Maxwell*, 1 Ohio St. 2d 134, — N.E.2d — (1965); *Carter v. Maxwell*, 177 Ohio St. 35, 201 N.E.2d 705 (1964).

⁶² In one recent case the Ohio Supreme Court, in dictum, stated that this was the status of habeas corpus in Ohio. *Walker v. Maxwell*, *supra* note 43, at 137, — N.E.2d at —. If this statement is true, what is the basis for the right-to-counsel cases? Perhaps the court is treating this particular constitutional defect as a loss of jurisdiction in a fundamental rather than a traditional sense.

⁶³ At the time this issue went to press, the Governor of Ohio had signed into law §§ 2953.21-24 of the Ohio Revised Code to provide a post-conviction procedure. The statute is similar to the Nebraska statute referred to in *Case v. Nebraska*, 85 S. Ct. 1483 (1965).